Kluwer Copyright Blog

Europe 1 – Premier League 0

P. Bernt Hugenholtz (Institute for Information Law (IViR)) · Sunday, October 9th, 2011

In its groundbreaking judgment of 4 October 2011 the Court of Justice of the European Union has essentially legalized the import, sale and use of foreign satellite television decoder cards. The judgment, which was given in two joined (originally British) cases, concerned decoder cards that provide access to encrypted satellite transmissions from Greece of British Premier League football matches. Foreign decoder cards such as these are widely sold and used in the United Kingdom, both for private viewing and in public houses, for they provide access to televised Premier League football at substantial lower cost than in the British domestic market.

In response to a request for a preliminary ruling by the British High Court, the Court of Justice held that provisions in UK law that prohibit the import, sale or use of foreign decoder cards are in conflict with the freedom to provide services, and cannot be justified since the Greek broadcasts were duly licensed by the Premier League and charges for the foreign decoder cards were being paid. Likewise such cards were held not to be 'illicit devices' within the meaning of Directive 98/84/EC (Conditional Access Directive), even if the cards were procured by providing false names and addresses and in breach with contractual restrictions, because the cards were originally manufactured and placed on the market with the authorization of the provider of the satellite service.

Most importantly, the Court of Justice also held that a system of exclusive broadcasting licenses that creates absolute territorial exclusivity in a Member State (i.e. Greece) by prohibiting the sale of decoder cards to foreign television viewers, is contrary to EU competition law. According to the Court these impediments to the freedom to provide services and freedom of competition are not justified because license income from encrypted satellite transmissions can be based on actual audiences both in the Member State of the broadcast and in other states where the broadcasts are received. In this connection the Court observed that partitioning markets with the sole aim of creating artificial price differences between Member States and thereby maximizing profits (price discrimination) is irreconcilable with the Treaty.

The judgment is likely to have far-reaching ramifications for current business practices in the broadcasting sector, as licenses conferring absolute territorial exclusivity are common, not only as regards televized football matches and other sporting events, but also in respect of motion pictures and other premium content offered by satellite pay TV services. The judgment might also affect current practices regarding web-based television services and other online content services that are territorially restricted by way of 'geoblocks' preventing access to foreign users. With its categorical rejection of absolute territorial exclusivity in copyright markets, the judgment will

surely give further impetus to ongoing discussions at the political level on the need to replace national, territorially defined copyrights by a structure of unitary European copyright law.

The thirty-page judgment of the Court additionally contains important holdings on issues of intellectual property law, in particular concerning the interpretation of Directive 2001/29 (Copyright in the Information Society Directive). Transient (i.e. temporary) copies of copyright works made in the memory of satellite decoder equipment are excepted from the reproduction right, because they serve a lawful purpose. Showing television broadcasts on a screen to customers of a public house however amounts to a (separate) act of 'communication to the public' within the meaning of the Directive – contrary to scholarly opinion that this concept applies only in cases of signals transmitted from a distance. Curiously, the Court also seems to opine that live televized reports of football matches do not qualify as copyright works, because the matches "are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright", and therefore are not intellectual creations. While the Court is right that matches per se are not copyright, it seems to overlook the fact that the live televised report of the matches may well, and probably always will be the result of creative cinematographic choices. The Court does admit however that there is copyright in various component parts of the broadcast, such as the opening leader, highlights compilations and graphics.

Altogether, the judgment illustrates the ECJ's increasingly activist role in copyright matters. With the EU's copyright harmonization machinery stuck in first gear since the 2001 InfoSoc Directive, the Court has now on three recent occasions (Infopaq, BSA, Premier League) seen fit to harmonize the subject matter protection ('the author's own intellectual creation'), the infringement standard for the reproduction right, and the right to communicate works in public places. One finds it hard to imagine what European copyright law will look like in a year or so from now, after the remaining twenty-something copyright cases that are currently pending before the Court have been decided.

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